

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WANDA ELIZABETH BRODEN

Claimant

VS.

WALGREENS CO.

Respondent

AND

AMERICAN ZURICH INSURANCE CO.

Insurance Carrier

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Docket No. 1,060,943

ORDER

Respondent requested review of the February 10, 2014, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on June 10, 2014.

APPEARANCES

James B. Biggs, of Topeka, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant to have a 10 percent functional impairment and a 70 percent permanent partial general disability based on a 40 percent task loss and a 100 percent wage loss.

Respondent appeals the nature and extent of claimant's disability, but argues for a 10 percent functional impairment and a 70 percent permanent partial general disability based on a 40 percent task loss and a 100 percent wage loss. The only dispute appears

to center around the average weekly wage being earned by the claimant on the date of accident. At the time of the regular hearing the parties submitted an average weekly wage of \$739.60. However, a stipulation filed by the parties on November 4, 2013, involved an agreement that claimant's average weekly wage would be \$698.40 prior to March 11, 2011, and would increase, with the addition of the fringe benefits on March 11, 2011, to \$782.23.

Claimant contends the Award should be affirmed, and does not dispute the stipulation regarding the average weekly wage.

FINDINGS OF FACT

Claimant suffered injury in the course of her employment on January 24, 2011, as she stepped down from a 12-foot stepladder. Claimant missed the last four steps of the ladder and landed on her back, hitting her head. The fall was witnessed by claimant's supervisor, Chris Ingram. Claimant testified she stayed on the floor for about five minutes before being helped up and taken to the break room. Claimant then sat for another 30 minutes before returning to work the remainder of the day, despite feeling lightheaded. Claimant testified she had been wearing a back brace that day. Claimant last worked on February 28, 2011, because she suffered a stroke.

Claimant sought medical treatment on her own with her family physician, Dr. Sloyer, on March 2, 2011. She was referred to Dr. Eidelman, who gave her an injection in her back and referred her to Dr. Camacho, a surgeon, who recommended surgery, but she decided against it because of the stroke. Five days after the March 2, 2011, visit, claimant was back with chest pains and facial numbness. It was determined she had another mild stroke or TIA. Claimant testified she didn't return to work after her leave of absence because she developed a neuropathy in her legs from diabetes and respondent had no jobs where she could be on her feet only three to four hours per day.

Claimant has not worked since the accident and is receiving social security disability. As of August 1, 2013, claimant has been receiving Medicare. Claimant continues to be under active treatment for her heart condition with Dr. Joliff.

Claimant first met with Joseph Sankoorikal, M.D., a board certified physiatrist, on September 27, 2012, for a court-ordered evaluation of her low back pain. Dr. Sankoorikal examined claimant and noted she had a history of a compression fracture at L2 and a possible fracture at L3, and degenerative disc disease with bulging at L5-S1 with no significant radicular type symptoms.

Claimant was seen on October 25, 2012, for follow-up. Dr. Sankoorikal opined claimant had an L2 compression fracture and degenerative disc disease of the lumbar spine with bulging.

Claimant was seen for follow-up on November 29, 2012. Dr. Sankoorikal felt that therapy helped, and advised claimant to continue with her home exercise program and to return as needed.

Claimant next saw Dr. Sankoorikal for follow-up on February 4, 2013. She reported her pain was a 3 out of 10, with pain occasionally radiating to the right lower extremity and numbness. She was seen on June 7, 2013, reporting feeling much better with a pain level of 2 out of 10.

Claimant met with Dr. Sankoorikal a final time on October 28, 2013. Dr. Sankoorikal found claimant to be at maximum medical improvement and rated claimant for the compression fracture at 5 percent permanent partial impairment to the body as a whole. He rated claimant at a 5 percent permanent partial impairment to the body as a whole for the low back, for a combined permanent partial impairment of 10 percent to the body as a whole. This impairment was based on the *AMA Guides*, 4th edition, and relates to the January 24, 2011, accident.

Dr. Sankoorikal felt claimant could return to gainful work and noted an FCE would be helpful. Upon review of a task list prepared by Michael Dreiling, Dr. Sankoorikal found claimant could no longer perform 4 out of 10 tasks for a 40 percent task loss.

At the request of her attorney, claimant met with Edward Prostic, M.D., a board certified orthopedic surgeon, on May 20, 2013, with complaints of continued intermittent low back pain without radiculopathy. Dr. Prostic determined claimant had sustained compression fractures of L2 and L3 as the result of her employment accident on or about January 28, 2011. He also indicated the claimant suffered a thoracic or lumbar sprain/strain and had a bulging disc at L5-S1, which he could not relate to claimant's fall at work. He noted degenerative conditions in the back.

Dr. Prostic did not feel claimant was in need of any additional treatment, but did state that from time to time with increased symptoms, claimant would need medication and intermittent heat or ice and possibly physical therapy. He felt claimant could return to light/medium level employment with restrictions of occasional lifting of 35 pounds knee-to-shoulder, avoid frequent bending or twisting at the waist and avoid forceful pushing or pulling or use of vibrating equipment. The restrictions were for a combination of the degenerative condition and the compression fractures. Using the *AMA Guides*, 4th edition, he assigned a 10 percent whole body impairment on a functional basis.

Dr. Prostic reviewed the task list of Mr. Dreiling and opined claimant had a 40 percent task loss, having lost the ability to perform 4 out of 10 tasks.

Claimant met with vocational consultant, Michael Dreiling, on July 8, 2013, for a vocational assessment. Mr. Dreiling identified 10 tasks that claimant performed over the 15 years prior to the injury. Claimant reported suffering a stroke in March 2011. She had

applied for social security disability. She has a wage loss of 100 percent as she is not working.

PRINCIPLES OF LAW AND ANALYSIS

The parties do not dispute the findings by the ALJ in the Award regarding claimant's 10 percent whole person functional impairment and 70 percent permanent partial general disability, based upon an average of claimant's 40 percent task loss and 100 percent wage loss. Those findings by the ALJ are affirmed by the Board.

The parties agree the award should be modified to utilize the appropriate average weekly wage presented to the Division on November 4, 2013, stipulating to an average weekly wage of \$698.40 up to March 11, 2011, with the wage increasing to \$782.23, with the addition of claimant's discontinued fringe benefits, effective March 11, 2011.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to incorporate the appropriate average weekly wage numbers pursuant to the stipulation of the parties, but is otherwise affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 10, 2014, is modified to incorporate the stipulated average weekly wage, but otherwise is affirmed.

An Award of Compensation is Hereby Made in Accordance with the Above Findings in favor of claimant and against respondent and its insurance carrier, American Zurich Insurance Company. Claimant is entitled to 6.57 weeks of permanent partial disability compensation at the rate of \$465.62 per week totaling \$3,059.12, followed by 171.57 weeks of permanent partial general disability compensation at the weekly rate of \$521.51, totaling \$89,475.47, for a total due and owing of \$92,534.59, which is ordered paid in one lump sum, minus amounts previously paid. Thereafter, claimant is awarded payments at the weekly rate of \$521.51, until the maximum amount of \$100,000.00 is reached, or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of July, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Brad E. Avery, Administrative Law Judge